FILED
MAR 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN ASHCROFT, etc., *et al.*,
Petitioners,

v.

PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

On Cross-Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF FOR THE CITY OF ST. LOUIS, MISSOURI AS AMICUS CURIAE IN SUPPORT OF THE CROSS-PETITIONERS

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March, 1982

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Missouri may require by statute that every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital.

2. Whether the State of Missouri may require by statute the attendance of a second physician, in addition to the primary surgeon, before an abortion of a viable fetus may be performed.

3. Whether the State of Missouri may require by statute the attendance of a second physician, in addition to the primary surgeon, before an abortion of a viable fetus may be performed.

4. Whether an award of attorneys' fees, made pursuant to Title 42 U.S.C. §1988, should be proportioned to accurately reflect the extent to which a plaintiff prevails.

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BRIEF FOR THE CITY OF ST. LOUIS, MISSOURI AS AMICUS CURIAE IN SUPPORT OF THE CROSS-PETITIONERS

This brief is presented for the City of St. Louis, a political subdivision of the State of Missouri, and is sponsored by the authorized law officer of the City of St. Louis. The brief is filed pursuant to Supreme Court Rule 36.4. The cross-petition for writ of certiorari supported by the City as amicus curiae was filed on March 1, 1982, and this brief is filed within the time allowed for filing a brief in opposition to said cross-petition.

INTEREST OF AMICUS

The City of St. Louis is a constitutional charter city of Missouri. As such, it has substantial authority to regulate businesses functioning within its boundaries. Under its Charter

and the law of Missouri, the City of St. Louis can and does provide for the licensing and regulation of hospitals and clinics, including abortion clinics. In 1974, the City of St. Louis enacted Ordinance No. 56729, regulating the performance of abortions within the City boundaries. Among the provisions of Ordinance No. 56729 was a requirement that abortions after the twelfth week of gestation be performed only in hospitals, and that reports be filed by abortion clinics stating information relative to the number, types, and complications of abortions performed in the City of St. Louis by the reporting facility. On November 12, 1981, Reproductive Health Services, Inc., one of the Respondents in No. 81-1623 (petitioners in No. 81-1255 here) instituted an action in United States District Court for the Eastern District of Missouri against certain officers of the amicus City, seeking to enjoin enforcement of Ordinance No. 56729. *Reproductive Health Services, Inc., et al.* v. *Eugene Camp, et al.*, No. 81-1439 C (2), E.D.Mo. A preliminary injunction issued on December 7, 1981. In response to a motion filed by defendants, the District Court stayed further proceedings "pending the disposition of the petitions for certiorari or appeals from the judgment of the Eighth Circuit in *Planned Parenthood of Kansas City*, 655 F.2d 848, (8th Cir. 1981)." Thus, the disposition of the questions presented by the cross-petition for writ of certiorari in the instant case (particularly the first question) will directly affect pending litigation involving an ordinance of the amicus, and will affect the general scope of the City's regulatory powers in this area.

REASONS FOR GRANTING THE WRIT

I. THE CROSS-PETITION SHOULD BE GRANTED BECAUSE THE QUESTIONS PRESENTED THEREIN, PARTICULARLY THE FIRST QUESTION, RELATING TO THE SCOPE OF A STATE'S POWER TO REGULATE PERFORMANCE OF ABORTIONS AFTER THE FIRST TRIMESTER OF PREGNANCY, ARE OF CONTINUING AND SUBSTANTIAL NATIONAL IMPORTANCE, AND MUST BE SETTLED BY THIS COURT.

In *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976), this Court was confronted with the first State legislative attempts to regulate the performance of abortions in the aftermath of *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973). Asserting that *Roe* v. *Wade* emphatically rejected the argument that the woman's right to abortion is absolute and that she is entitled to abortion " 'at whatever time, in whatever way, and for whatever reason she alone chooses,' " 428 U.S. at 60, the Court reiterated that, in light of *Roe*, the State may, after the first trimester of pregnancy, regulate the abortion procedure in ways that are reasonably related to maternal health. 428 U.S. at 61; see also *Maher* v. *Roe*, 432 U.S. 464 (1977). With uncommon prescience, Justice WHITE wrote that the "task of policing this limitation on state police power is and will be a difficult and continuing venture in substantive due process." *Planned Parenthood, supra*, at 92. The instant case clearly reprsents the "third wave" of attack upon State regulation of abortion, which, unless turned back by this Court, will, in practical effect, guarantee "abortion on demand" at least through the eighteenth week of pregnancy, and probably whenever substantial medical opinion can be mustered to support a "safe" procedure, without regard to weeks of gestation. More importantly, however, the decision below is fraught with serious consequences for the police power of the States in areas far beyond regulation of abortion.

The District Court in this instant case found that a particular second trimester abortion procedure ("D & E") was not (at the time of trial) readily available in hospitals in Missouri, that this procedure would be more expensive if performed in a hospital, and that the statutory requirement that all second trimester abortions be performed in hospitals resulted in performance of fewer second trimester abortions in Missouri than would otherwise be the case. The District Court also found "D & E" to be the safest second trimester abortion technique currently available. Consequently, the Missouri hospitalization requirement made "D & E" unavailable to "many" women in Missouri, and thereby created a substantial interference with or a direct burden on the decision to have an abortion. See Cross-Petition, A-115. Since the "D & E" procedure was as safe, in the view of both the District Court and the Court of Appeals, when performed in a hospital as not, the burden of justification placed on the State was insurmountable, and both lower courts found it appropriate to invalidate the hospitalization requirement for *all* second trimester abortions.

The conclusion of the courts below that the second-trimester hospitalization requirement is an unduly burdensome interference with the woman's freedom to decide whether to terminate her pregnancy seems to rest on insecure foundations. The primary factors in this conclusion were the degree to which one type of second trimester procedure ("D & E") was available in Missouri hospitals, and the relative cost of non-hospitalized and hospitalized "D & E" procedures. See Cross-petition A-117 - A-118. Once this was shown, the issue became relative safety, not of *all* hospitalized and non-hospitalized second trimester abortions, but rather of hospitalized and non-hospitalized "*D & E*" procedures. *Id.* at A-118. The statute at issue, §188.025, R.S.Mo. 1978, did not draw its lines so narrowly, and seemingly it should be appraised on the same basis as it applies. Unlike the statute in *Planned Parenthood of Missouri* v. *Danforth, supra,* §188.025, R.S.Mo. 1978, does not prescribe or proscribe any

method of abortion; it merely seeks to insure that *all* second trimester abortions are performed under conditions assuring maximum safety for the women. The courts below did not find that hospitalized second trimester abortions do not insure maximum safety, they merely concluded that *some* non-hospitalized abortion procedures are *as safe*. It does not follow that a hospitalization requirement for all such procedures is not reasonably related to maternal health.

The crux of the opinion of the Court of Appeals in this case is found in its conclusion that because *some* second-trimester abortions can be performed safely and cheaply outside of hospitals, a requirement that all such abortions be performed in hospitals constitutes an impermissible or unduly burdensome interference with the pregnant woman's freedom to decide whether to terminate her pregnancy, unsupported by any reasonable relationship to the protection of maternal health. See Cross-petition A-117 - A-119; but cf. *Maher* v. *Roe, supra.* This approach is clearly at variance with due process and equal protection analysis applicable to State regulations under the police power, whether in the abortion context or not.[1] The Court of Appeals here has created the precise situation which led the three-judge court to reject an almost identical challenge to a Michigan second-trimester hospitalization requirement involved in *Gary-Northwest Indiana Women's Services, Inc.* v. *Bowen,* 496 F.Supp. 894, 899-900 (N.D.Ind. 1980), aff'd, ____ U.S. ____, 101 S.Ct. 2012 (1981):

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[1] It is not easy to characterize the analyses applied by this Court in evaluating abortion regulations. Challenges on vagueness or overbreadth grounds seemingly have involved due process, see *Colautti* v. *Franklin,* 439 U.S. 379 (1979), while others have apparently proceeded on some form of equal protection theory, i.e., that abortions (or the person seeking them) should not be treated differently than other medical procedures (or persons seeking them). Cf. *Maher* v. *Roe, supra; H.L.* v. *Matheson,* ____ U.S. ____, 101 S.Ct. 1164 (1981). Perhaps all of these theories are best classified as substantive due process.

To adopt the plaintiffs' theory and hold Indiana's hospitalization requirement unconstitutional because of its impact on nontherapeutic early second trimester D & E abortions would ultimately require that the second trimester be split for purposes of determining the constitutionality of regulations. Such a holding would require states to adopt, for their maternal health regulations, some cutoff other than the end of the first trimester. The *Roe* language clearly demonstrates the intent of the Supreme Court to encourage, indeed force, states to use the end of the first trimester as a cutoff point for regulations designed to protect maternal health. That is precisely what Indiana and many states have done. *Roe* implied that states would not be required to treat one portion of the second trimester different from another portion of the second trimester. *Roe* implied that it was proper for states to adopt regulations dealing with the entire second trimester. If a general regulation of second trimester abortions protects maternal health, then, *Roe* holds, the regulation is constitutional, notwithstanding its impact on a specific second trimester abortion or a specific group of second trimester abortions.

* * *

. . . Under *Roe,* a maternal health regulation may take effect at the end of the first trimester. If the constitutionality of the regulation depended on whether, as a matter of fact, an abortion was more dangerous than childbirth, then it must be remembered that each individual pregnancy raises its own set of facts. The safety of a given abortion, the safety of a given childbirth, and the relative safety of an abortion vis a vis childbirth in a given pregnancy, all depend on a multitude of medical factors which vary with each and every pregnancy. Such a rule would have the potential of making the constitutionality of each specific application of a regulation depend to a large degree on the

> factors present in that specific case. If the Supreme Court had intended that complicated medical judgment be decisive on whether specific regulations were reasonably related to maternal health, then the Supreme Court would surely have instead adopted the more rational rule that the abortion's effectuation must be left to the medical judgment of the pregnant woman's attending physician. That was the rule adopted for first trimester abortions. It was the intent of the Supreme Court to allow states to regulate second trimester abortions as a group, and *Roe* holds that as long as the regulation is reasonably related to the maternal health of women in the second trimester of their pregnancy, the regulation is constitutional.

What the Court of Appeals has protected in this case is not the pregnant woman's right to obtain an abortion, but rather the physician's right to choose where the abortion shall be performed. The scope of this right is apparently controlled solely by the weight of prevailing medical opinion (as reflected by the evidence presented by specific parties at a specific point in time before a district court).

"The Constitution does not compel a State to fine-tune its statutes so as to encourage or facilitate abortion." *H.L.* v. *Matheson, supra,* 101 S.Ct. at 1173. Yet the Court of Appeals in this case demands precisely such fine-tuning:

> The central issue is the relative safety of nonhospitalized D & E and hospitalized methods. No quantitative studies are cited which directly compare the relative safety of the two procedures. However, the district court has found explicitly that a nonhospitalized second trimester D & E procedure is just as safe as those second trimester D & E procedures conducted in hospitals. Since the district court's finding is not clearly erroneous, we find that nonhospitalized second trimester D & E procedures are no more dangerous to maternal health than hospitalized procedures. Consequently, we hold that section 188.025 is not

> reasonably related to maternal health and, therefore, the requirement that all second trimester abortions be performed in hospitals is unconstitutional. See *Planned Parenthood* v. *Danforth,* 428 U.S. 52, 76 (1976).

[Cross-petition A-118 - A-119. Footnote omitted.]

Safety of surgical procedures is almost always likely to be relative, and the State "has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe* v. *Wade, supra,* 410 U.S. at 150; see also *Connecticut* v. *Menillo,* 423 U.S. 9 (1975). That *some* second-trimester abortion procedures may be safe if performed outside hospitals surely does not warrant invalidation of a regulation applicable to all such procedures, if the regulation in general is reasonably related maternal health. See *Planned Parenthood of Missouri* v. *Danforth, supra.* No doubt some abortions performed by nonlicensed personnel are performed as safely as those performed by physicians, but legislation must of necessity operate on classes and not on a case-by-case basis. Cf. *Connecticut* v. *Menillo, supra.*

This Court has previously recognized that a legitimate State interest in maternal health attaches during the second trimester of pregnancy, justifying certain regulations in furtherance of that interest. *Roe* v. *Wade, supra; Planned Parenthood of Missouri* v. *Danforth, supra.* The Court of Appeals would contract (or expand) that regulatory authority almost annually, based upon mortality and morbidity statistics and the degree to which abortion procedures are introduced or become obsolete. Obviously this cannot be the definition of the scope of State regulatory authority under the Fourteenth Amendment with respect to abortion. The judgment as to what will best insure maximum safety for the pregnant woman is one that the legislature must make; the courts should intervene only when that judgment unduly burdens all women seeking abortion dur-

ing the second trimester and is not reasonably related to maternal health. Since the judgment made by the legislature of Missouri in this case, considered in the proper context, does not unduly burden the choice to seek a second trimester abortion and is not irrational, but is in fact reasonably related to maternal health, the judgment of the Court of Appeals cannot stand, and certiorari should issue to review and correct the decision below.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS ON THE QUESTIONS PRESENTED IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND THIS COURT.

In striking down Missouri's regulatory scheme applicable to second trimester abortions, the Court of Appeals took note of the conflicting decisions of lower federal courts on the subject. Cross-Petition, A-118 - A-119, n. 6. In particular, the Court of Appeals was aware of *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 651 F.2d 1198 (6th Cir. 1981), pet. for cert. pending, Nos. 81-746, 81-854, 81-1172. More importantly, the Court of Appeals in the instant case also ignored controlling decisions of this Court. In *Roe* v. *Wade, supra* 410 U.S. at 163, this Court expressly stated:

> With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Ex-

amples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

Subsequently, in *Gary-Northwest Indiana Women's Service, Inc.* v. *Bowen, supra,* a three-judge district court rejected a constitutional challenge to a regulatory scheme similar to Missouri's. Respecting the hospitalization requirement for second trimester abortions, the district court stated (496 F.Supp. at 900):

> The plaintiffs' argument could be construed as an argument that the Roe test to be applied to early second trimester D & E abortions is not the second trimester test, but the first trimester test. This argument could be stated as follows: Roe allows regulation not of second trimester abortions, but only of abortions more dangerous than childbirth. This seems to be the theory underlying the two District Court cases supporting the plaintiffs' argument. The specific ultimate rulings of Roe with regard to the various stages of pregnancy were somewhat arbitrary judgments necessitated by a wide variety of factors. This Court must respect Roe's specific ultimate rulings. If this Court does not respect the specific ultimate ruling in Roe, those rulings will lose their usefullness. In the line which the Supreme Court drew at the end of the first trimester is not respected, states will be hard pressed to pursue their legitimate, compelling, interests in protecting maternal health. If a regulation is covered by Roe, the regulation's constitutionality is determined on the basis of specific lines drawn by the Supreme Court.

On direct appeal, this Court summarily affirmed. 101 S.Ct. 2012. See also, *Wynn* v. *Scott*, 449 F.Supp. 1302 (N.D. Ill. 1978), appeal dismissed, 439 U.S. 8 (1978), aff'd 599 F.2d 193 (7th Cir. 1979). Although a summary affirmance is recognized as lacking the same precedential value as a judgment of this Court delivered after plenary consideration, the binding precedential effect of such a decision until this Court takes other action cannot be doubted. See, e.g., *Metromedia, Inc.* v. *City of San Diego*, ___ U.S. ___, 101 S.Ct. 2882 (1981); *Akron Reproductive Services, Inc.* v. *City of Akron, supra.* Nevertheless, the Court of Appeals in this case chose to disregard both the clear language of *Roe* v. *Wade* and the force and effect of *Gary-Northwest, supra,*[2] relying instead upon its own conception of what the law should be and its own judgment of what good medical practice permits.

Clearly, the Constitution must be the same for both the Eighth Circuit and the Sixth Circuit, and the decisions of this Court should not be ignored or amended by the lower federal courts at will - regardless of the nature of the issue. See, e.g., *Hutto* v. *Davis*, ___ U.S. ___, 70 L.Ed.2d 556 (1982). Accordingly, certiorari should be granted on the cross-petition so that this Court can resolve the conflict among the lower federal courts on the questions herein,[3] and restore the "bright line" drawn by *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra.*

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[2] The jurisdictional statement in *Gary-Northwest* clearly presented the constitutional question at issue here, albeit in the preliminary injunction context. 49 U.S.L.W. 3691 (1981)

[3] Amicus City also strongly believes that the fourth question presented in the cross-petition merits consideration by the Court.

CONCLUSION

The decision of the Court of Appeals in this case implies that the scope of State regulatory powers can be delimited in certain areas (such as abortion regulation) by the balance of professional opinion of certain procedures at a certain point in time. Constitutional law cannot rest upon such shifting sands. Certiorari should issue to review and correct the judgment of the Court of Appeals.

Respectfully submitted,

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